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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 226

GABBS EXPLORATION COMPANY, *Petitioner,*

v.

STEWART L. UDALL, Secretary of the Interior.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITIONER'S REPLY MEMORANDUM

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Respondent does not dispute our assertion (Pet. 10) that the question now tendered "is presently involved in a host of proceedings currently pending at various stages within the Interior Department's lengthy administrative processes."

But since his opposition beclouds unduly an area of law that no degree of optimism—or of accuracy—can fairly characterize as clear, we deem it appropriate to add a few words to assist the Court in orienting itself among the diversities.

1. The basic conflict among the decisions here is between the proposition, repeated at the last Term (*Best* v.

Humboldt Mining Co., 371 U. S. 334, 338), that, "If a patent has not yet issued, controversies over the claims 'should be solved by appeal to the land department and not to the courts,'" and the holding in *Boesche* v. *Udall*, 373 U.S. 472, 478, also at the last Term, that the Secretary has administrative power to cancel a mineral lease, because that instrument "does not give the lessee anything approaching the full ownership of a fee patentee, nor does it convey an unencumbered estate in the minerals" —citing and quoting from *Wilbur* v. *Krushnic*, 280 U. S. 306, 316-317.

Petitioner's predecessors in title, owners of mining claims, had unencumbered estates in the minerals; as this Court said in the *Krushnic* case, *loc. cit. supra*, "his possessory right, for all practical purposes of ownership, is as good as though secured by patent."

Therefore the question here is which of these two divergent lines of doctrine controls here. Was petitioner's right "as good as though secured by patent," as it contends, or was it not really as good as secured by patent, and hence still subject to destruction by the Secretary as the latter urges?

Nothing in the Secretary's Brief in Opposition assists in resolving that question.

2. As we have always conceded (Pet. 13), a dictum in *Ickes* v. *Development Corp.*, 295 U. S. 639, 645, is against us, and the court below genuflected thereto without the slightest effort at analysis (Pet. App. A4-A5).

We went on to explain why none of the authorities cited in the *Development Corp.* decision supported the dictum (Pet. 14-16), and the Secretary does not even attempt to rehabilitate these authorities. (We pass the obvious point that our detailed analysis of the authorities is hardly subject to the Secretary's remark (Br. Op. 5) that in our Petition the expression in the *Development Corp.* case "is, without more, dismissed as dictum.")

We note further that, unlike the court below (Pet. App. A4), the Secretary does not assert that what was said in the *Development Corp.* case regarding his power to cancel valid, perfected mining claims for subsequent abandonment was necessary to the decision, nor could he, since abandonment was excluded both by the record and the opinion in that case (Bill of Complaint, ¶¶ 4, 6, R. 1-2, No. 23, Oct. T. 1934; 295 U. S. at 646, quoted at Pet. 13).

Moreover, the subject matter of the dictum in the *Development Corp.* case was conceded rather than contested by the respondent there (Resp. Br. 8, No. 23, Oct. T. 1934), so that, on familiar principles, even the dictum has less weight than it would have had if the proposition it asserted had been the subject of a genuine challenge. E. g., *United States* v. *Tucker Truck Lines*, 344 U. S. 33, 37-38, and cases there cited; *Gaines* v. *Relf*, 12 How. 472, 537-539.

Finally, the Secretary contends (Br. Op. 7) that the *Development Corp.* dictum "has long been followed by the courts," citing (Br. Op. 7-8) "e.g., *Robbins* v. *Elk Basin Consol. Petroleum Co.*, 285 Fed. 179, 181 (D. Wyo., 1922)."

This is loose citation with a vengeance. Since the *Development Corp.* case was decided here in 1935, obviously it was not followed by a District Court over a decade earlier, in 1922. Moreover, the *Robbins* case did not involve, as does the case at bar, an effort to cancel a perfected mining claim for subsequent abandonment. It dealt with a preference right to a lease in which it had been determined that the prospective claimant was not entitled thereto because the mining claim on which the preference depended had been abandoned.

The fact of the matter is that the Secretary's "e.g." (Br. Op. 7) is thoroughly misleading, because it entirely conceals the complete absence of holdings his way on the present issue. He cites no such holdings—and, apart from the ruling sought to be reviewed, we know of none.

8. We are, of course, aware that a Reply Memorandum such as this one should not concern itself with debating points, but we consider it a duty to expose certain of the obfuscations devised by the Secretary in his effort to defeat review in this case.

(a) He says (Br. Op. 7): "And even in *Wilbur* v. *Krushnic*, 280 U. S. 306, where it was held that the Secretary had erred in declaring a claim forfeited for failure to do assessment work, this Court did not question the Secretary's *jurisdiction* to make such a determination." [Italics in original.]

What that case held however was, not that the Secretary had erred, but that he had no *power* to declare a claim forfeited on that ground. We had supposed, along with Mr. Justice Curtis (30 Fed. Cas. at 1342-1343), that power and jurisdiction were synonymous.

(b) In response to our contention (Pet. 18-19) that the enactment of Sec. 7 of the Act of Aug. 13, 1954, c. 739, 68 Stat. 708, 711, 30 U. S. C. § 527, which empowered the Secretary to dispose of dormant mining claims, demonstrated his lack of such power earlier, the Secretary says (Br. Op. 8) that this legislation, "at best, merely supplements the Secretary's independent authority to institute adverse proceedings and to find that mining claims have been lost by failure to comply with the mining laws or by abandonment."

No doubt the foregoing is a convenient rationalization at the present juncture. But the Secretary's suggestion that he was being granted supplementary powers in 1954 is not supported by so much as a syllable in either of the committee reports on the 1954 legislation. Sen. Rep. 1610 and H. R. Rep. 2028, both 83rd Cong., 2d sess., both *passim*.

(c) Finally, mention must be made of the Secretary's footnote suggestion (Br. Op. 5, n. 1) that petitioner's predecessors in title did not have valid, perfected mining claims.

The voluminous proceedings within the Interior Department (JA 9-39) do not even suggest that the several claims now in issue were not in every sense fully perfected at the time of location. Neither does the Secretary's answer in the present litigation (JA 40-43). The original contests (JA 11, 20) never questioned the original validity of any of the claims. And, of course, the Secretary, who asserted that portions of the land on which petitioner's claims were located had been the subject of oil and gas leases to third parties (JA 43), leases that he plainly could not lawfully make if petitioner's claims were valid (*Union Oil Co.* v. *Udall*, 289 F. 2d 790, 791, note 1 (D. C. Cir.)), will hardly now endeavor to contend that the present claims concern lands that are non-mineral.

CONCLUSION

The question presented is one of continuing public interest that is neither foreclosed nor indeed resolved by prior decisions. This petition for a writ of certiorari should therefore be granted.

Respectfully submitted.

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